In the Supreme Court

OF THE

United States

OCTOBER TERM, 1972

No. 71-1698

UNITED STATES OF AMERICA, *Petitioner*

vs.

CECIL J. BISHOP

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT

J. RICHARD JOHNSTON,
NEIL F. HORTON,
ROBERT H. SOLOMON,
JOHNSTON, KLEIN, HORTON & SOLOMON,
833 United California Bank Building,
Oakland, California 94612,
Attorneys for Respondent.

PERNAU-WALSH PRINTING CO. - 562 MISSION STREET - SAN FRANCISCO, CA 94105

Subject Index

Table of Authorities Cited

Codes

Constitutions

Regulations

Rules

Senate Reports

Statutes

Texts

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1972

No. 71-1698

UNITED STATES OF AMERICA, *Petitioner*

vs.

CECIL J. BISHOP

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE RESPONDENT

QUESTION PRESENTED

Does the word "willfully" mean something less in Section 7207[1] of the Internal Revenue Code, a mis-

[1]Internal Revenue Code of 1954 (26 U.S.C.):
Section 7207 [as amended by Sec. 7 Self-Employed Individuals Tax Retirement Act of 1962, P.L. 87-79, 76 Stat. 809].
Any person who willfully delivers or discloses to the Secretary or his delegate any list, return, account, statement, or other document, known by him to be fraudulent or to be false as to any material matter, shall be fined not more than $1,000, or imprisoned not more than 1 year, or both. * * *

demeanor, than the same word in Section 7206(1)[2] of that Code, a felony, so that taxpayer was entitled to a lesser included offense instruction?

STATEMENT

Cecil J. Bishop ("the taxpayer") was convicted after trial by jury in the United States District Court for the Eastern District of California on a three count indictment[3] charging violation of Section 7206(1) of the Internal Revenue Code of 1954 (26 U.S.C.) for 1963, 1964, and 1965 (App. 5-7, 31-32.) Taxpayer is an attorney practicing in Sacramento, California, and during the indictment years he also operated a walnut ranch near Red Bluff, California. (Tr. 895-896)[4]. Louise Bishop is the taxpayer's stepmother and she also managed the walnut ranch. (Tr. 897.)

---

[2]Internal Revenue Code of 1954 (26 U.S.C.):

Section 7206.

Any person who—

(1) Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury and which he does not believe to be true and correct as to every material matter,

* * *

shall be guilty of a felony and, upon conviction thereof shall be fined not more than $5,000, or imprisoned not more than three years, or both, together with the costs of prosecution.

[3]Although the indictment was returned in the Northern District of California, the case was transferred to the Eastern District of California for trial.

[4]"Tr." references are to the trial transcript.

The taxpayer sent weekly checks to Louise Bishop to pay ranch expenses and, in addition, paid other ranch expenses directly by check. All checks were drawn on a single checking account, which the taxpayer used for both his law practice and his personal expenses. (Tr. 487.) At the end of each year, one of the secretaries in the taxpayer's law office prepared a schedule classifying all checks issued according to type of expenditure. The taxpayer attached such a schedule (which he identified as Schedule A) to his return for each of the years in question, and he deducted as farm expenses the total of the checks classified by his secretary as "Farm". (Pl. Ex. 1, 2, and 3, Tr. 63)[5].

Following the end of each indictment year, Louise Bishop handed the taxpayer a schedule of ranch expenditures for the year. (Tr. 912, 913, 916, 917.) Nowhere did Mrs. Bishop attempt to reconcile the total expenditures listed in her schedules with the total funds provided by the taxpayer, and the taxpayer testified that he believed that Louise Bishop's schedule for 1963 represented expenditures advanced by her from her own funds, in addition to the funds he had provided. (Tr. 910, 911.) In preparing his 1963 return, therefore, he attached a copy of Louise Bishop's schedule (which he identified as Schedule B), and he deducted as farm expenses the total of the checks listed on that schedule in addition to the total of the checks classified as "Farm" on the schedule prepared

[5]"Pl. Ex." references are to the Government's exhibits introduced at trial.

by his secretary. In fact, this resulted in duplication of expenses deducted.[6]

Among the taxpayer's checks for the year 1963 which his secretary classified as "Farm", and which were included in his Schedule A, were certain loan repayments to Bank of America which were not properly deductible. The similar schedules for the years 1964 and 1965 likewise included some nondeductible expenditures which were classified by the taxpayer's secretary as "Farm" and incorrectly included in the total amount deducted as farm expenses. These nondeductible items are conveniently identified and summarized in the trial court's instructions to the jury. (App. 19-21.)

While the prosecution and the defense did not agree upon the amount by which farm expenses had been overstated for any of the three years, the defense acknowledged that there had been some overstatement. The primary thrust of the defense was that while the returns may have been incorrect, the errors were not intentional on the part of the taxpayer. The taxpayer testified that when he filed the returns he was unaware of the errors. The Government attempted to rebut this evidence through the testimony of the ranch manager and by attempting to show a pattern of incorrect returns. Willfulness thus became

---

[6]The Government incorrectly states in its brief that such duplication of expenses occurred in each of the indictment years. The Government's exhibits (Pl. Ex. 1, 2 and 3, Tr. 63) clearly show, however, that there was no duplication in any indictment year other than 1963, and the trial court's instructions to the jury likewise make this clear (App. 19-21).

a critical issue in the case, and it was in this setting that the taxpayer requested lesser included offense instructions.

The taxpayer requested that the jury be given instructions permitting it to find him guilty of violation of Section 7207 of the Internal Revenue Code of 1954 (26 U.S.C.), a misdemeanor, as a lesser included offense within Section 7206(1) of that Code, a felony. The District Court refused to give the requested instructions and the taxpayer was convicted of the felony offense for each of the three years. He appealed, urging as error the failure to give the requested instructions and the admission of certain evidence at trial. The Court of Appeals reversed on the lesser included offense issue and did not reach the question of admission of evidence. Thereafter the Government petitioned this Court for certiorari, and the petition was granted.

SUMMARY OF ARGUMENT

The word "willfully" as used in Section 7207 denotes a lower level of culpability than that denoted by the same word as used in Section 7206(1). Since the elements of the misdemeanor defined by Section 7207, when applied to income tax returns, are otherwise the same as the elements of the felony defined by Section 7206(1), Section 7207 is a lesser included offense under Section 7206(1). The taxpayer was therefore entitled to have the jury so instructed, and

the trial court's failure to give such an instruction was reversible error.

There are at least three distinct lines of cases defining willfulness in tax misdemeanors. The Third and Fifth Circuits define the term to require bad faith or evil motive, as in felony cases. The Ninth Circuit holds that the requirement in misdemeanor cases is met by a showing that a taxpayer's action is unreasonable, capricious or exhibits careless disregard toward his tax obligation. The First and Seventh Circuits take a middle course, holding that while mere negligence or capriciousness is insufficient to constitute willfulness, it is not necessary to show bad faith or evil motive.

If, in this context, willfulness is a word of more than a single meaning, as the taxpayer contends, then the action of the Court of Appeals must be sustained, whether this Court adopts the Ninth Circuit view or the position taken by the First and Seventh Circuits. Under either of those views, there was in this case a factual dispute as to the degree of willfulness which the jury should have been allowed to resolve.

Our position that "willfully" has more than one meaning avoids interpreting these felony and misdemeanor sections as covering precisely the same ground. It is also consistent with the lower standard of willfulness generally required for purely statutory misdemeanors. Finally, the existence of a statutory hierarchy of tax offenses strongly suggests that the willfulness required for a tax misdemeanor is of a lesser degree than that required for a felony.

The Government directs its argument primarily to the correctness of the instructions requested by the taxpayer, rather than to the charge actually given by the trial court. But even if the instructions requested by the taxpayer were incorrect, he may nevertheless challenge his conviction on appeal, since the issue on appeal is the correctness of the instructions actually given.

The other arguments advanced by the Government are equally unpersuasive. Although it urges that this Court held in *Sansone* that willfulness invariably has the same meaning in tax misdemeanors as in tax felonies, it conceded the contrary in *Ming v. United States*. Moreover, a minor difference in the wording of the two sections, to which the Government points, does not create a difference in the factual elements included in the two offenses.

The taxpayer's position is legally correct and it provides a proper framework within which the jury can resolve the disputed facts of the case. The Government's position is legally incorrect and inconsistent with the jury's central role in our jurisprudence.

ARGUMENT

THE WORD "WILLFULLY" AS USED IN SECTION 7207 OF THE INTERNAL REVENUE CODE MEANS SOMETHING LESS THAN THE SAME WORD AS USED IN SECTION 7206(1) OF THAT CODE. THEREFORE THE TAXPAYER IN THE INSTANT CASE WAS ENTITLED TO AN INSTRUCTION THAT SECTION 7207 IS A LESSER INCLUDED OFFENSE WITHIN SECTION 7206(1).

This case presents the single issue of whether the misdemeanor section (7207) is a lesser included offense within the felony section (7206(1).) The resolution of this question depends in turn upon whether the culpability requirement in the felony section is greater than that in the misdemeanor section.

I

WHEN A LESSER INCLUDED OFFENSE INSTRUCTION IS APPROPRIATE

Rule 31(c) of the Federal Rules of Criminal Procedure provides in pertinent part that, "The defendant may be found guilty of an offense necessarily included in the offense charged * * *." This rule is a restatement of existing law[7] and embodies two alternative approaches[8], which may be identified, respectively, as (a) the common law or *necessarily* included offense formulation, and (b) the more modern cognate or *lesser* included offense formulation. Courts gener-

---

[7]Notes of Advisory Committee on Rules, Note to Rule 31, Subdivision (c); 2 Wright, *Federal Practice and Procedure: Criminal* §515.

[8]*Olais-Castro v. United States*, 416 F. 2d 1155, 1157 (C.A. 9, 1969).

ally accept both versions of the rule. *Olais-Castro v. United States, supra,* at 1157; Comment, *Jury Instructions on Lesser Included Offenses,* 57 Nw. U.L. Rev. 62, 62-63 (1962).

Common to both approaches is the proposition that a lesser included offense is made out where some, but not all, of the elements of the offense charged themselves constitute a lesser offense, provided, however, that the jury must be able to find a disputed factual element required for the greater offense which is different from or not included in the lesser offense. *Sansone v. United States,* 380 U.S. 343, 349-350 (1965); *Berra v. United States,* 351 U.S. 131, 134 (1956); Wright, *Federal Practice: Criminal, supra;* 8 Moore's *Federal Practice* (2d ed.) ¶31.03. The introduction of any evidence tending to prove the disputed factual element requires the giving of the lesser included offense instruction. *Stevenson v. United States,* 162 U.S. 313, 314 (1896).

The common law or *necessarily* included offense formulation requires, in addition, that for a lesser included offense instruction to be given, it must be impossible to commit the greater offense without committing the lesser. This is the doctrine which the Government urges. (Br. 8.) The cognate or *lesser* included offense doctrine, however, requires only that the elements of both offenses be cognate or overlapping.

The modern view is that a lesser included offense instruction is appropriate where there is an inherent relationship between the greater and lesser offense,

i.e., both offenses must relate to the protection of the same interests and usually, although not invariably, proof of the lesser offense is presented as part of the proof of the greater offense. *United States v. Whitaker,* 447 F.2d 314, 319 (C.A.D.C., 1971); American Law Institute, *Model Penal Code* (Proposed Official Draft, May 4, 1962), Section 1.07.

We intend to show that a lesser included offense instruction was appropriate in this case under either formulation of the rule.

II

ANALYSIS OF OFFENSES INVOLVED

a. History

Section 7206 has a sparse legislative history. The section was enacted to consolidate in one section and to make generally applicable to certain taxes, including income taxes, various penal provisions relating to fraud and false statements. The first subsection of that section, the felony here involved, was derived from Section 3809(a) of the Internal Revenue Code of 1939. S. Rep. No. 1622, 83d Cong. 2d Sess., 147 (3 U.S. Cong. & Admin. News (1944) 5252.) Section 3809(a) itself had drawn together a number of sections dealing with false returns. Compare Act of August 27, 1949, c. 517, 63 Stat. 666, Secs. 4(a) and 4(b).

Section 7207, the misdemeanor here involved, has a long and varying history. This Court traced that history in *Achilli v. United States,* 353 U.S. 373, 376-

379 (1957) and later in *Sansone v. United States,* 380 U.S. pp. 347-349 (1965). As those cases indicate, the section and its predecessors have gone through three evolutionary periods. The section was initially enacted in 1798 prior to the enactment of the first income tax law. It later became applicable to the two income tax statutes enacted prior to *Pollock v. Farmers' Loan & Trust Co.,* 157 U.S. 601 (1895). Following *Pollock* and the passage of the Sixteenth Amendment, new legislation[9] was enacted which contained specific penal provisions applicable to the income tax. This new statute accomplished a *pro tanto* repeal of the then equivalent of Section 7207 as it applied to income tax. *Achilli v. United States,* 353 U.S., p. 376. Later reenactments, culminating in Section 3616(a) of the Internal Revenue Code of 1939 continued this *pro tanto* repeal. *Achilli v. United States,* 353 U.S., pp. 376-379. As this Court pointed out in *Sansone,* 380 U.S., p. 348, the conclusion that Section 3616(a) and its predecessors (misdemeanor sections) were repealed as to income tax was compelled by the fact that those sections covered precisely the same ground as the predecessor of Section 7201 of the 1954 Code (a felony section) which was applicable to income tax, and this Court was unwilling to presume that Congress intended to enact the same provision applicable to income tax as both a felony and a misdemeanor.

In enacting the Internal Revenue Code of 1954, Congress made major changes in Section 7207. In

[9]Section II of the Revenue Act of 1913, 38 Stat. 114, 166.

addition to changing the placement and numbering of the section, Congress deleted the requirement that the filing of a false or fraudulent return be made "with intent to defeat or evade" tax. Also, such filing was explicitly required to be "willful". The net effect of these changes was to make the section applicable once again to income tax. *Sansone v. United States,* 380 U.S., p. 349.

b. Elements of the Two Offenses

The elements of Section 7206(1) are (1) filing a return known[10] to be false, (2) that the return be signed under penalty of perjury, and (3) willfulness. 10 Mertens, *Law of Federal Income Taxation* (Rev.) §55A. 13, pp. 68-69. The elements of Section 7207 are (1) filing a return known to be false, and (2) willfulness. *Sansone v. United States,* 380 U.S., p. 352. 2 Devitt and Blackmar, *Federal Jury Practice and Instructions* (2d ed.) §52.24 (1970). As Section 7207 applies to income tax returns, other provisions of the law supply the additional requirement that the return be signed under penalty of perjury.[11]

---

[10]The statute uses the word "believe" rather than "know". See discussion *infra* where we point out that the difference between these two words creates no new factual element.

[11]Section 6065(a) of the Internal Revenue Code of 1954 requires that any return or other document required to be filed under any provision of the Internal Revenue Code be executed under the penalties of perjury unless otherwise provided by the Secretary or his delegate. Individuals such as the taxpayer are required to use Form 1040 for their income tax returns. Treasury Regulations on Income Tax (1954), §1.6012-1(a)(6) (26 C.F.R.). Form 1040 contains a printed declaration that it is executed under penalties of perjury. (Pl. Ex. 1, 2, and 3, Tr. 63). Therefore, if a false return is filed, it must be filed under penalties of perjury for the purposes of both Sections 7206(1) and 7207.

From a comparison of the two sections here in question, it is apparent that the elements of both are the same (as applied to income tax returns) unless "willfully" is a word of more than one meaning in the context of these sections. If "willfully" has the same meaning in both sections, a lesser included offense instruction is not appropriate, since there is then no disputed factual element required for the greater offense which is different from that required for the lesser offense. If "willfully" means something less in the misdemeanor section than in the felony section, a lesser included offense instruction is required.

III

A LESSER INCLUDED OFFENSE INSTRUCTION IS REQUIRED IN THIS CASE

As has been said may times, willful is a word of many meanings. At the present time, there are at least three, and possibly four, definitions of the term as applied to tax misdemeanors.[12] *United States v. Lachmann*, 72-2 U.S.T.C., ¶9766 (C.A. 1, November 29, 1972). Many of these cases are collected in 22 A.L.R. 3d 1173.

The Third and Fifth Circuits define "willful" in tax misdemeanor cases to have the same meaning as

---

[12]Most of the decided cases in this area involve Section 7203. The reason for the paucity of cases dealing with Section 7207 is that until the decision in *Sansone*, the Government took the position that Section 7207 did not apply to income tax returns and this offense was therefore not charged in income tax cases. See *Achilli v. United States*, 353 U.S., p. 375. The Government apparently recognizes the relevance of cases decided under Section 7203 (Br. 19).

in tax felony cases, i.e. requiring bad faith or an evil motive. Third Circuit: *United States v. Vitiello,* 363 F. 2d 240 (1966); *United States v. Palermo,* 259 F. 2d 872 (1958); *United States v. Litman,* 246 F. 2d 206 (1957); *United States v. Kahriger,* 210 F. 2d 565 (1954) (Sections 3290 and 3291 of the Internal Revenue Code of 1939). Fifth Circuit: *Haner v. United States,* 315 F. 2d 792 (1963). But cf. *McBride v. United States,* 225 F. 2d 249 (1955). It is this bad faith or evil motive definition which the trial court adopted in the instant case (App. 17).

The Ninth Circuit defines the willfulness required for tax misdemeanors as something less than that required for tax felonies. (455 F. 2d 612, 614; Pet. 16.) Under the Ninth Circuit definition, the requirement of willfulness in a tax misdemeanor case is met by a showing that the taxpayer's action is unreasonable, capricious or exhibits careless disregard concerning his tax obligation. (455 F. 2d at 615; Pet. 16; *Abdul v. United States,* 254 F. 2d 292 (C.A. 9, 1958), after remand 278 F. 2d 234 (1960), certiorari denied 364 U.S. 832.)

The third group of cases, decided in the First and Seventh Circuits, constitutes a middle ground between the bad faith or evil motive test of the Third and Fifth Circuits and the test adopted by the Ninth Circuit. Cases in this third group hold that the Government need not show bad faith or an evil motive in tax misdemeanor prosecutions, but they reject the proposition that negligence or capriciousness is sufficient to prove willfulness in such cases. *United States*

v. Lachmann, supra; United States v. Ming, 466 F. 2d 1000 (C.A. 7, 1972), certiorari denied 93 S. Ct. 235; *United States v. Matosky,* 421 F. 2d 410 (C.A. 7, 1970), certiorari denied 398 U.S. 904; *United States v. Fullerton,* 189 F. Supp. 211 (Md., 1960). The Government nowhere mentions this third line of cases in its brief, and it is not clear from its brief which line of authority it supports.

The Government has consistently taken the position in the Ninth Circuit that the standard of willfulness required for conviction of willful failure to file a return under Section 7203 of the Internal Revenue Code (a misdemeanor) is less than that required for conviction of attempted tax evasion under Section 7201 (a felony). Moreover, in *Abdul* and subsequent cases decided by the Ninth Circuit the Government has consistently (and successfully) resisted appeals in that circuit by taxpayers convicted under Section 7203 where the trial court's instructions to the jury defined willfulness in terms of conduct that was "unreasonable", or "capricious", or evidenced "careless disregard", the precise words to which the Government now objects so strenuously. The Government has, moreover, opposed review by this Court in such cases where the taxpayer petitioned for certiorari. *Abdul v. United States, supra; United States v. Fahey,* 411 F. 2d 1213, cert. den. 396 U.S. 957 (C.A. 9, 1969).

In his Brief in Opposition in *Abdul v. United States* (October Term, 1960, No. 104), the Solicitor General states (pp. 4-5):

> Despite the petitioner's assertion to the contrary (Pet. 20-29), the element of willfulness in the context of charges of failure to file tax returns [a misdemeanor] need not be defined in the precise terms of "evil motive * * * bad faith or evil intent." In *Spies v. United States* 317 U.S. 492, 497-498, this Court, differentiating between the meaning of willfulness in connection with misdemeanor and felony charges, pointed out that "[m]ere voluntary and purposeful, as distinguished from accidental, omission to make a timely return might meet the test of willfulness," where the charge involved a failure to file.

See also Brief for the United States in Opposition in *Fahey v. United States,* (October Term, 1969, No. 576) at pp. 7-8.

Briefly stated, our position here is that willfulness means something less in Section 7207 than in Section 7206(1). If we are correct in that assertion, the decision of the Court of Appeals must stand whether this Court adopts the Ninth Circuit view or the position taken by the First and Seventh Circuits. This result must follow because under either of these views there is a disputed factual element required for the greater offense which is different from that required for the lesser offense.

In interpreting the meaning of willfulness, this Court's duty is "to give coherence to what Congress has done within the bounds imposed by a fair reading of legislation." *Achilli v. United States,* 353 U.S., p. 379. In so doing, the Court has stated that it is "unwilling to presume that Congress intended to enact

both felony and misdemeanor provisions which completely overlap in this important area." *Sansone v. United States*, 380 U.S., p. 348. Since the elements of the two sections overlap when applied to income tax offenses, our interpretation of the meaning of willfulness provides the requisite coherence to the statutory provisions in question and avoids the result which this Court has sought to avoid. That interpretation represents the only reasonable explanation of the statutory pattern which Congress has constructed. *United States v. Bysozoski*, 144 F. Supp. 806, 808 (N.J., 1956).

Culpability is not a unitary concept, but involves several identifiable levels, including negligence, recklessness, knowledge, and purpose. To fix the level of culpability in any crime requires reference to the intent of Congress, taking into account constitutional considerations as well as the common law background, if any, of the crime involved. *United States v. Freed*, 401 U.S. 601, 613-614 (1971) (concurring opinion by Mr. Justice Brennan). See American Law Institute, *Model Penal Code* (Proposed official draft, May 4, 1962), Section 2.02 and comments thereon contained in Tentative Draft No. 4, April 25, 1955, par. 10.

The intent of Congress seems clear in fixing the level of culpability in Section 7207. By enacting Section 7201, Congress effected a *pro tanto* repeal of the predecessor of Section 7207 as applied to income tax prosecutions, since both sections contained the same elements. Thereafter Congress, in once again making Section 7207 applicable to income tax prosecutions,

eliminated the requirement of intent to defeat or evade taxes, words associated with evil motive, and added the word "willfully". Should we now conclude that Congress eliminated a duplication between Section 7207 and one felony section (Section 7201) only to create a duplication between Section 7207 and another felony section (Section 7206(1))? We think not. Rather, by eliminating words denoting evil motive and inserting "willfully", Congress must have intended that the willfulness requirement of Section 7207 be satisfied by something less than an evil motive.

The lack of common law background of Section 7207 is also significant. Because tax misdemeanors are purely statutory and have no common law background, they should logically be grouped with other purely statutory misdemeanors, each of which requires a low standard of culpability.[18] A brief sampling of such misdemeanors is provided by the following cases: *Riss & Company v. United States,* 262 F. 2d 245 (C.A. 8, 1958) (Interstate Commerce Act); *Trenton Chemical Co. v. United States,* 201 F. 2d 776 (C.A. 6, 1953), certiorari denied 345 U.S. 994 (Grain Conservation Order of War Powers Act); *Nabob Oil Co. v. United States,* 190 F. 2d 478 (C.A. 10, 1951) (Fair Labor Standards Act); *United States v. Perplies,* 165 F. 2d 874 (C.A. 7, 1948) (OPA violation);

[18]The Government's argument that Section 7206(1) *does* have a common law background (Br. 21-22), if correct, would furnish a reason for the higher requirement of willfulness in Section 7206(1) in contrast to Section 7207, which has no such background.

United States v. Eastern Airlines, 192 F. Supp. 187 (S.D. Fla. 1961) (Violation of Civil Aeronautics Board Order).

Finally, the existence of a hierarchy of tax offenses strongly suggests that willfulness in a tax misdemeanor is of a different quality from that required for a felony. *Spies v. United States, supra.*

The Government argues (Br. 18-20) that even if the degree of willfulness required under Section 7207 is not identical with that required under Section 7206(1), the standard spelled out in the instruction requested by the taxpayer was wrong because it would permit the jury to convict under Section 7207 upon a showing of mere carelessness, and that it was therefore not error to refuse to give those instructions. But even assuming that the instructions requested by the taxpayer were incorrect in that respect, it does not follow that he is thereby foreclosed from challenging his conviction on appeal. Such an argument betrays a misunderstanding of the framework within which appellate courts examine a jury charge.

Under Rule 30, Federal Rules of Criminal Procedure, "No party may assign as error any portion of the charge *or omission therefrom* unless he objects thereto before the jury retires to consider its verdict, stating distinctly the matter to which he objects and the grounds of his objection. * * *" (Emphasis added.) The rule permits, but does not require, a party to request specific instructions that correct the error in the instructions given or supply those that have been omitted.

The rule is aptly summarized in 8 Moore's *Federal Practice* (2d ed.) ¶30.04, page 30-11 as follows: "In determining the overall propriety of instructions, an appellate court focuses not on the correctness of the requests, but on the correctness of the charge itself." Indeed, a party making a timely objection to a jury charge need not file any requested instruction in order to have the correctness of the charge considered on appeal. *United States v. English,* 409 F. 2d 200 (C.A. 3, 1969).

The objection made by the taxpayer in the trial court (App. 28) embodies exactly and succinctly the position urged by him in this court.

Therefore, if the trial court's charge was erroneous for the reason stated in the objection, the action of the Court of Appeals in reversing his conviction was clearly proper, whether or not his requested instructions correctly stated the law.

A question is raised at this point as to the correct interpretation of this Court's decision in the *Sansone* case. The Government argues that *Sansone* holds that willfulness invariably has the same meaning in tax misdemeanors as in tax felonies, thereby foreclosing our argument to the contrary (Br. 15-16). We argue that *Sansone* embodies only a factual analysis and a holding that the facts there present were insufficient to vitiate willfulness required for a conviction of either a felony or a misdemeanor.

In *United States v. Ming, supra,* the taxpayer was convicted of violating Section 7203, a misdemeanor. The taxpayer petitioned this Court for certiorari on

the ground, among others, that "willfully" has the same meaning in Section 7203 as in the felony sections, relying on *Sansone*. (Petition for Writ of Certiorari, October Term, 1972, No. 72-152, pp. 13, 15-17.) The Government replied (Brief for the United States in Opposition p. 6):

> Petitioner is mistaken in suggesting (Pet. 15-17) that *Sansone* supports his criticism of the jury instruction here involved. The portion of the *Sansone* opinion which petitioner quotes (Pet. 15-16) demonstrates merely that, on the facts of a particular case, there may be violations of both Sections 7201 and 7203, with no differentiating fact to be found by the jury (and hence no need for a lesser included instruction).

We believe that the Government's analysis in *Ming* sufficiently answers its contrary assertion here.

A subsidiary argument urged by the Government is that Section 7207 cannot be a lesser included offense of Section 7206(1), since the former section punishes the filing of a return "known" to be false while the latter section punishes a return believed to be false. (Br. 20-22.) If we accept the argument that these two similar words signify different factual elements in the offenses in which they appear, we have the curious result that filing a return which the taxpayer merely believes to be false is punished more severely than filing a return which he knows to be false.

The Government argues for this result on grounds that the special requirements of the general perjury statute (18 U.S.C. §1621), including specifically a

special meaning of belief, are imported into Section 7206(1). This is patently erroneous. In *Escobar v. United States,* 388 F. 2d 661 (C.A. 5, 1967), certiorari denied 390 U.S. 1024, the case upon which the Government placed primary reliance in both courts below, the court stated (p. 664):

> The statute [Section 7206(1)] does *not* say that one who willfully makes a false return "shall be guilty of perjury." In fact, it contains no language indicating that the crime of perjury is involved at all. The language "made under penalties of perjury" is of purely historical significance.

Moreover, if the Government were correct in arguing that each element of perjury is present in Section 7206(1), then the willfulness requirement of bad faith or evil motive, which is absent from the general perjury statute,[14] would likewise be absent from Section 7206(1). This, of course, is contrary to the Government's primary argument.

We conclude, therefore, that the use of the word "believe" in Section 7206(1) does not create a factual element different from that created by the use of the word "known" in Section 7207, and that the two words as used in these sections should be given the same meaning.

Finally, the Government contends that the lesser included offense instruction allows the jury to dispense mercy and frustrates the prosecutor's discretion.

---

[14] *Maragon v. United States,* 187 F. 2d 79, 80 (C.A.D.C., 1950), certiorari denied 341 U.S. 932.

(Br. 8, 20, 23.) This assumes that the jury will disregard evidence requiring conviction of a felony in order to convict only of a misdemeanor. As the Court said in *United States v. Whittaker*, 447 F. 2d at 321:

> If the evidence is such that a jury can rationally—and is likely—to choose the lesser offense, then the interests of justice call for the defense to have the option of the lesser included offense—whether the prosecution chose to put it in the indictment or has the right later to request it or not. This recognizes "the jury's central role in our jurisprudence," and if the jury errs too obviously on the side of mercy instead of justice in determining the offense, the trial judge may be in position to restore some balance at the time of sentencing.

In this case the jury could have found from the evidence (a) that the taxpayer's false returns were filed with an evil motive, and could therefore have convicted him of a felony under Section 7206(1), or (b) that the returns were filed intentionally but without an evil motive, warranting conviction of a misdemeanor under Section 7207, or (c) that they were filed without knowledge of their falsity, thus warranting acquittal. In the name of prosecutorial discretion the Government would deprive the jury of the right to make the second finding. Such a result would be legally incorrect and inconsistent with the jury's central role in our jurisprudence.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

J. RICHARD JOHNSTON,
NEIL F. HORTON,
ROBERT H. SOLOMON,
JOHNSTON, KLEIN, HORTON
& SOLOMON,
Attorneys for Respondent.

December, 1972